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14 UNITED STATES DISTRICT COURT
15 FOR THE CENTRAL DISTRICT OF CALIFORNIA

16 UNITED STATES OF AMERICA, ED CR No. 18-231-JGB
17 Plaintiff,
18 v.
19 JOHN JACOB OLIVAS,
20 Defendant.

GOVERNMENT'S OPPOSITION TO
DEFENDANT'S MOTION IN LIMINE TO
PRECLUDE VOUCHING (DKT. 73)

Hearing Date: November 15, 2021
Hearing Time: 2:00 P.M.
Location: Courtroom of the
Hon. Jesús G. Bernal

22
23 Plaintiff United States of America, by and through its counsel
24 of record, the Acting United States Attorney for the Central District
25 of California and Assistant United States Attorneys Eli A. Alcaraz
26 and Frances S. Lewis hereby files its opposition to defendant's
27 motion in limine to preclude vouching (dkt. 73).
28

This opposition is based upon the attached memorandum of points and authorities, the files and records in this case, and such further evidence and argument as the Court may permit.

Dated: October 26, 2021

Respectfully submitted,

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/s/
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

3 Defendant John Jacob Olivas ("defendant") used his position and
4 power as a federal law enforcement agent to sexually abuse two of his
5 intimate partners and prevent them from reporting his assaults to law
6 enforcement. Defendant's abuse of his federal law enforcement
7 authority violated the victims' constitutional rights: namely, their
8 rights to liberty and bodily integrity. For three specific sexual
9 assaults of K.L. and N.B., defendant is charged with three counts of
10 deprivation of rights under color of law, in violation of 18 U.S.C.
11 § 242.

12 Defendant moves in limine for an order preventing the government
13 from doing what the law is already clear the government cannot:
14 vouching for the credibility of its witnesses. Defendant appears to
15 take a rigid linguistic view and seeks targeted prohibitions on
16 specific words during trial. The government does not dispute that in
17 closing argument it is precluded from, for example, standing up and
18 arguing to the jury: "I believe these victims, therefore you should
19 too." See United States v. Roberts, 618 F.2d 530, 533 (9th Cir.
20 1980) ("It is improper for the prosecution to vouch for the
21 credibility of a government witness. Vouching may occur in two ways:
22 the prosecution may place the prestige of the government behind the
23 witness or may indicate that information not presented to the jury
24 supports the witness's testimony.")

25 Defendant's motion, however, goes beyond asking the Court to
26 affirm the law. Without the benefit of any context, defendant seeks
27 to have the Court ex ante preclude the government from using common
28 phrases like "I believe" and "we know." This would sweep in all

1 kinds of unobjectionable phrases like, "I believe we started trial on
 2 Tuesday in this case," and "we know that this happened while
 3 defendant was an HSI special agent because he was employed as one at
 4 the time," neither of which is remotely objectionable. See United
 5 States v. Weatherspoon, 410 F.3d 1143, 1173 (9th Cir. 2005) (Trott,
 6 J., concurring in part and dissenting in part) ("Is it vouching every
 7 time a lawyer says 'I believe,' or 'I submit,' or 'I think?' Of
 8 course not, but our opinions too often jump inappropriately to the
 9 conclusion that such formulations necessarily amount to impermissible
 10 'vouching.'"); United States v. Younger, 398 F.3d 1179, 1191 (9th
 11 Cir. 2005) ("We emphasize that prosecutors should not use 'we know'
 12 statements in closing argument. Nonetheless, the record in this case
 13 confirms that the prosecutors used the phrase 'we know' to marshal
 14 evidence actually admitted at trial and reasonable inferences from
 15 that evidence, not to vouch for witness veracity or suggest that
 16 evidence not produced would support a witness's statements.").

17 Not only is defendant's motion narrowly focused on words without
 18 context, but it is premature. The Ninth Circuit requires a defendant
 19 to object when he believes the government has gone too far. United
 20 States v. Necochea, 986 F.2d 1273, 1276 (9th Cir. 1993) (explaining
 21 requirement to object to vouching at trial). Filing a motion in
 22 limine to preclude "vouching" does not relieve defendant of this
 23 obligation. There is simply no way for this Court to determine in a
 24 void what statements would or would not constitute vouching, and the
 25 Court should decline defendant's invitation to do so.

26 **II. ARGUMENT**

27 "[V]ouching consists of placing the prestige of the government
 28 behind a witness through personal assurances of the witness's

1 veracity, or suggesting that information not presented to the jury
 2 supports the witness's testimony." United States v. Ruiz, 710 F.3d
 3 1077, 1085 (9th Cir. 2013) (quotation omitted); Necoechea, 986 F.2d
 4 at 1276. The government agrees with defendant that the first form of
 5 vouching occurs when the prosecutor asserts a personal opinion of the
 6 credibility of a witness. See United States v. Young, 470 U.S. 1, 11
 7 (1985); Ruiz, 710 F.3d at 1085.

8 Courts, however, should examine "arguments in the context of the
 9 arguments that they rebut." United States v. Wilkes, 662 F.3d 524,
 10 539 (9th Cir. 2011); Young, 470 U.S. at 11 ("[A] criminal conviction
 11 is not to be lightly overturned on the basis of a prosecutor's
 12 comments standing alone, for the statements or conduct must be viewed
 13 in context; only by doing so can it be determined whether the
 14 prosecutor's comments affected the fairness of the trial."). For
 15 example, "a prosecutor may respond substantially to a defense
 16 counsel's attack in order to right the scale." United States v.
 17 Doss, 630 F.3d 1181, 1194 (9th Cir. 2011). Describing a witness's
 18 role, experience, and knowledge is not vouching for the witness's
 19 credibility. See Doss, 630 F.3d at 1193 (government did not vouch by
 20 pointing out that informant's status as a convicted felon "uniquely
 21 situated" him in a position to overhear the defendant's statements in
 22 inmate-transportation van). Even an express credibility endorsement
 23 might be permissible in response to a defendant's repeated attacks on
 24 the witness's credibility. See United States v. Wallace, 848 F.2d
 25 1464, 1474 & n.16 (9th Cir. 1988); see also Necoechea, 986 F.2d at
 26 1279 (in context, "I submit to you that she's telling the truth" was
 27 not vouching); see also Doss, 630 F.3d at 1194-95 (government's
 28 rebuttal remarks appropriate response to defense's allegations that

1 the government had "cooked" the case in order to win); United States
2 v. Sayetsitty, 107 F.3d 1405, 1409 (9th Cir. 1997) (closing argument
3 appropriate response to defense counsel's characterization of case as
4 "web of deception").

5 The Court cannot rule in advance of trial whether certain
6 statements by the government will or will not constitute vouching
7 because so much of the analysis depends on context. "[S]tatements
8 made by the prosecution do not constitute improper vouching where the
9 argument that witnesses had no motive to lie is a permissible
10 response to the defense counsel's earlier attacks on the witnesses's
11 [sic] credibility." Wilkes, 662 F.3d at 540. Furthermore,
12 statements that "witnesses had no motive to lie" are not vouching
13 when they are "simply inferences from evidence in the record."
14 United States v. Nash, 115 F.3d 1431, 1439 (9th Cir. 1997); see also
15 United States v. Crosby, 748 Fed. App'x 752, 753 (9th Cir. 2018)
16 ("The prosecutor's statement that the government's witness . . . had
17 no 'dog in the fight' and submission that it was reasonable to
18 believe [she] testified truthfully did not cross the line" where
19 "viewed in context, [the statement] was an argument of 'inference
20 from evidence in the record' rather than vouching").

21 As these cases illustrate, context matter. The case put on by
22 defendant matters. Where a defendant attacks the credibility of the
23 government's witnesses, the government is allowed to push back.
24 "Prosecutors can argue reasonable inferences based on the record, and
25 have considerable leeway to strike hard blows based on the evidence
26 and all reasonable inferences from the evidence." United States v.
27 Tucker, 641 F.3d 1110, 1120 (9th Cir. 2011) (streamlined). Indeed,
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1 "hard blows" are "often the essence of argument." United States v.
2 Sarno, 73 F.3d 1470, 1496 (9th Cir. 1995).

3 Simply put, this is not an issue that can be decided in a motion
4 in limine -- if the government makes a statement that defendant
5 concludes has crossed the line from arguing into vouching, defendant
6 needs to object. Only then, with the benefit of context, will the
7 Court be equipped to evaluate whether the arguments are appropriate
8 or not.

9 **III. CONCLUSION**

10 For the foregoing reasons, the government respectfully requests
11 that this Court deny the defendant's motion in limine (dkt. 73).

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